NO. 84903-0

SUPREME COURT OF THE STATE OF WASHINGTON

D. EDSON CLARK,

Appellant/Intervenor/Petitioner,

v.

SMITH BUNDAY BERMAN BRITTON, PS, *et. al.*

Respondents.

AMICUS CURIAE MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON and WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION SUPPORTING PETITIONER CLARK

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I. INTRODUCTION

The public is interested in how courts work, not just end results. Judges, jurors, litigants, lay and expert witnesses, prosecutors and other attorneys all have important interacting roles in our adversarial system of justice. In guaranteeing open administration of justice, the Washington Constitution provides a window for viewing *all* players at *all* stages, absent an overriding interest in secrecy. To obscure any part of that view is to deprive the public of understanding the justice system *as a whole*. Light should shine not on judges alone, but on anyone influencing how and when the public's judicial resources are expended. Displaying the entire system helps the public understand how well our laws and court rules are working, whether judges, prosecutors and public defenders have adequate resources to perform their tasks, and what if any reforms are needed.

The Court of Appeals in this case has pulled the shade over too much of the window. Now, a record filed under seal can remain forever hidden – even though a party considered it important enough to file in a public court - unless a newspaper or citizen can prove that a judge actually considered the record in making a decision. This unprecedented constraint on open administration of justice reflects an

overly narrow view of what is important to the public, and should be reversed.

This Court should clarify that a record becomes "part of the court's decision-making process," as referenced in Dreiling v. Jain[1], when the record is filed in court, regardless of whether it is ever used by a judge in making a decision. As noted in In re Marriage of Treseler and Treadwell,[2] whether a court used a record in decision-making is an impractical standard because it requires speculation about a judge's or jury's thoughts. Moreover, allowing a court to keep records sealed solely because it never considered them – as happened in this case – ignores the principle that Article I, Section 10 applies as much to the process as to the results of litigation. As this Court stated in Rufer v. Abbott Laboratories, the right to open administration of justice

> is not concerned with merely whether our courts are generating legally sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained.[3]

Because the public's interest goes beyond court decisions and the records considered in making those decisions, reversal is warranted.

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[1] 151 Wn.2d 900, 93 P.3d 861 (2004).
[2] 145 Wn.App. 278, 285, 187 P.3d 773 (2008).
[3] 154 Wn.2d 530, 549 (2005) (emphasis in original), citing Allied Daily Newspapers v. Eikenberry. 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

II. INTEREST AND IDENTITY OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. The Washington Newspaper Publishers Association (WNPA) is a trade association representing 120 weekly community newspapers throughout Washington. Both Allied and WNPA ("The Newspapers") regularly advocate for public access to records, including court records, to achieve government accountability for the citizens of this state. The Newspapers' members frequently use civil and criminal court records to inform their readers about issues and controversies of public interest.

The Newspapers have been involved in this case throughout the appellate process, including submitting three prior amicus briefs supporting intervenor-petitioner Ed Clark. The Newspapers are concerned that it is impractical to prove that a court actually considered a record in making a decision, and that as a result of this new standard, newspapers will be unable to inform readers about information of public interest. Also, the Newspapers are concerned that the new standard improperly places the burden of proof on citizens, instead of on the proponents of secrecy, erecting new barriers to informing the public about courts. The Newspapers also have a strong interest in

rebutting the notion that evaluating the performance of judges is the only legitimate reason to view court records. The Newspapers submit that, while the actions of judges are certainly of vital interest, the public also has a compelling interest in observing the actions of prosecutors, lawyers, litigants, witnesses, or others who influence the courts and consume their resources. The Newspapers believe that *any* use of our taxpayer-funded court system invites public scrutiny, unless there is a compelling interest in secrecy outweighing the public interest.

III. DISCUSSION

A. Only a Compelling Interest in Secrecy Can Justify Sealing.

The decision below creates a new prerequisite for unsealing records that are filed under seal, pursuant to a protective order, in anticipation of a court decision. Bennett v. Smith Bunday Berman Britton, PS, 156 Wn.App. 293, 296, 234 P.3d 236 (2010). That is, even if there is no compelling interest justifying continued secrecy, unsealing records is required only "[t]o the extent they enter into the court's decision-making process *in making any ruling*." Id. (italics added). The Court stated:

> Does the public have a constitutional right of access to sealed documents that were filed with the court in anticipation of a decision when the court does not read the

> documents and does not make the anticipated decision? Following Rufer, we conclude the answer is no because such documents have not become part of the court's decision-making process.

Id. at 304, referring to Rufer v. Abbott Laboratories, 154 Wn.2d 530, 114 P.3d 1182 (2005).

This is the first time that the presumption of openness has been limited to records actually affecting an issued ruling. Previously, *any* record filed in court in anticipation of a court ruling was presumptively open, and subject to the compelling-interest test for sealing, regardless of whether the anticipated ruling was made or whether the judge actually read the record. Rufer, 154 Wn.2d at 535. In fact, Marriage of Treseler and Treadwell, which followed Rufer, expressly rejected the notion that the public has no interest in a record unless it is "used by the court to make a decision." Treadwell, 145 Wn. App. 278, 282, 285 (2008).

> Rufer did not hold that only documents that a trial court considered in rendering a decision are subject to the Ishikawa test. Rather, the court held that any document filed in 'anticipation of a court decision,' whether or not dispositive of the entire case, triggers the public's right of access and requires a compelling interest to seal.

Id. at 285. Thus, Treadwell correctly affirmed that the public has a protected interest in viewing *any* record "that passes before a trial court," even if the record is not used in a decision. Id.

There is no sound legal or policy basis for departing from prior case law. As noted in Treadwell,[4] whether a court used a record in making a decision is an impractical standard because it requires speculation about a judge's thoughts. Besides, as this Court stated in Rufer: "The open administration of justice is more than just assuring that a court achieved the 'right' result in any given case." 154 Wn. 2d at 542. Discussing "the extent of the public's right" to open courts, this Court said:

> If we define this right narrowly to consist only of the observation of events leading directly up to the court's final decision, then arguably any documents put before the court that were not part of that final decision would be outside of the scope of article I, section 10. Put another way, if the jury does not see it, the public does not see it. **But our prior case law does not so limit the public right to the open administration of justice.** As previously noted, the right [to open administration of justice] is not concerned with merely whether our courts are generating legally sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained.

Id. at 548-49 (italics in original, bold added).

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[4] 145 Wn. App. at 285.

This Court should apply the same reasoning here. Unless the proponent of sealing establishes a compelling interest in secrecy overriding the public's interest in open courts, the public should be able to observe all workings of our tax-funded court system. This includes not just "results" but all court filings offered to influence those results. Rufer, 156 Wn.2d at 548-49.

B. A Record Becomes "Part of the Decision-Making Process" If It is Relevant to a Motion When Filed, Regardless of What Happens After Filing.

The Court of Appeals decision is rooted in a misunderstanding of language in Dreiling v. Jain, 151 Wn. 2d 900, 93 P.3d 861 (2004). In that case, the Seattle Times intervened in a shareholder derivative suit involving Infospace, Inc., and sought to unseal records related to a motion to terminate the suit. This Court held that the Ishikawa compelling-interest test must be applied before sealing dispositive motions or the records supporting such motions. Dreiling, 151 Wn.2d at 904.

This Court said there are "good reasons to distinguish between" records that are attached to a dispositive motion filed in court, and "mere discovery" material that surfaces before trial and is "unrelated, or only tangentially related, to the underlying cause of action." Id. at

909-10. Referring to the latter category of material that is obtained through pretrial discovery and turns out to be unrelated to the lawsuit, this Court said: "As this information does not become part of the court's decision making process, article I, section 10 does not speak to its disclosure." Id. In making that statement, the Court was simply distinguishing between records at the extreme ends of the public-interest spectrum – those which are not even relevant to a controversy and therefore are *not* filed in court, and those which are so highly relevant that they are filed in court to justify a desired disposition.

The Court of Appeals in this case has misconstrued what it means to "become part of the court's decision making process." Dreiling at 909-10. Under Dreiling, it is the relevance of the record to the lawsuit - not the record's ultimate impact on the case – that matters in a sealing analysis. Dreiling reflects the sound reasoning that if a record is relevant enough to be attached to a dispositive motion, it should be open to public view, unless an important countervailing interest in secrecy outweighs the public interest in openness. Id. at 912. Dreiling does *not* say that the public has no interest in a record unless it is actually considered by a court in decision-making. It does not

suggest that controversies which have consumed court resources are worthy of public attention only if they elicit judicial attention.

Rufer affirms this reasoning. In that case, the defendant in a product liability suit moved to seal certain trial and motion exhibits that allegedly contained proprietary information. 154 Wn.2d at 536-37. This Court held that the Ishikawa test applied to all records filed in court in anticipation of a decision, whether dispositive or not. Id. at 549. Addressing the concern that parties could try to embarrass opponents by attaching confidential but irrelevant documents to motions, this Court said:

> If a party attaches to a motion something that is both **irrelevant to the motion** and confidential to another party, the court should seal it. When there is indeed **little or no relevant relationship between the document and the motion**, the court, in balancing the competing interests of the parties and the public pursuant to the fourth *Ishikawa* factor, would find that there are *little or no valid interests*...of the public with respect to disclosure of the document.

Id. at 547-48 (italics in original, bold added). Thus, it is relevance to the parties' motions – to the relief sought – that matters, and it is not the court's action or inaction that determines whether a record is presumptively open.

C. The Policies Underlying Open Courts Strongly Favor Reversal.

This Court very recently affirmed the important principles underlying Article 1, Section 10 as follows:

> The open administration of justice assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary.

In re Detention of D.F.F., ___ Wn.2d ___, 256 P.3d 357, 359 (2011). Such openness "is fundamental to the operation and legitimacy of the courts and to the protections of all other rights and liberties." Id. at 362. Courts derive their authority "from the people." Id. Public scrutiny of court proceedings assures that "they are fair and proper." Id.

Under these principles, the entire litigation process must be scrutinized in order to engender public confidence in the judicial system as a whole. For example, the fairness and wisdom of prosecutors – elected by the people to achieve justice - is reflected in court filings that may or may not ever lead to judicial decisions. Product liability cases also can raise compelling public concerns, regardless of what a court does or doesn't decide, because they may reveal of pattern of safety problems that should be addressed in legislative or other forums. In general, public knowledge of civil disputes should not depend on whether a court has a chance to act

before settlement, because once a dispute enters the courts it consumes public resources and puts into play the entire system of rules, laws, rights, and advocacy designed to ensure fairness. The ultimate results are not the only measure of how well the system works.

In sum, an open court system depends on access to *all* courts records, not just those known to have influenced a decision. Accordingly, the decision below should be reversed and this Court should adhere to the Rufer standard that any record filed in anticipation of a court decision is presumptively open and subject to the constitutional sealing test.

IV. CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated this 15th day of September, 2011.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 15, 2011, I caused the delivery of a copy of the Motion for Leave to File an Amicus Curiae Memorandum, and related memorandum, to the following:

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Dated this 15th day of September 2011, at Seattle, Washington.

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